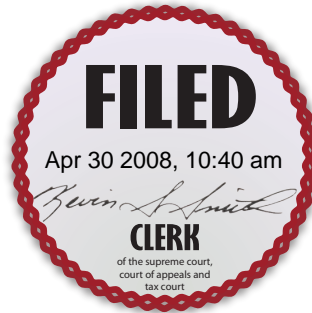


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

ROBERT KARR,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 49A02-0711-CR-937

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Patricia J. Gifford, Judge
The Honorable Amy Barbar, Magistrate
Cause No. 49G04-0608-FA-157272

April 30, 2008

MEMORANDUM DECISION – NOT FOR PUBLICATION

MATHIAS, Judge

Robert Karr (“Karr”) was convicted in Marion Superior Court of Class A felony child molestation. Karr was sentenced to twenty-five years in the Department of Correction. Karr appeals, raising three issues that we restate as follows:

- I. Whether Karr’s counsel was ineffective.
- II. Whether a juror question revealed juror bias and resulted in fundamental error.
- III. Whether the evidence is sufficient to establish that Karr committed Class A felony child molestation.

We affirm.

Facts and Procedural History

M.J. was born on May 17, 1989. During the time in question, she resided in Indianapolis. A number of other relatives, including her great-uncle Karr, who was at least twenty-one years old at the time, lived in the same vicinity. She would often swim in Karr’s pool with other children in the neighborhood. The incident in question occurred during one of the two summers between 2000 and 2002 when M.J. was approximately eleven years old. According to M.J., she was touched by Karr in his house as she sat on his lap in his recliner. M.J. described that Karr “took my bathing suit from the side and put his finger [in] my vagina.” Tr. p. 68. M.J. left and told her older brother but provided no details. She then told her grandfather who asked Karr about the allegation. Her grandfather also told M.J.’s mother. However, M.J. did not provide details about the molestation until she entered counseling a year or two later.

On May 27, 2003, Marion County Department of Child Services reported an alleged child molestation to the Indianapolis Police Department. Detective Steven Buchanan was assigned to investigate. He located the victim, M.J., and proceeded to

interview her. M.J. alleged that she had been molested two or three years before by her great-uncle Robert Karr.

On August 24, 2006, Karr was charged with Class A felony child molestation and Class A felony attempted child molestation. A two-day jury trial began on February 26, 2007. After the completion of the State's evidence, Karr moved for a directed verdict. The trial court granted the motion as to the of Class A felony attempted child molestation. The jury found Karr guilty of Class A felony child molestation. On March 12, 2007, Karr was sentenced to twenty-five years in the Indiana Department of Corrections. Karr appeals.

Discussion and Decision

I. Ineffective Assistance of Counsel

Karr argues that he received ineffective assistance of trial counsel.¹ In a review of ineffective assistance of counsel claim, we utilize the two-pronged test set forth in Strickland v. Washington, 466 U.S. 668 (1984). Overstreet v. State, 877 N.E.2d 144, 151-52 (Ind. 2007). First, the defendant must show that counsel's performance fell below an objective standard of reasonableness and that errors committed by counsel were so serious that the defendant was effectively denied the right to counsel guaranteed by the Sixth Amendment of the United States Constitution. Id. at 152. "Isolated mistakes, poor strategy, inexperience, and instances of bad judgment do not necessarily render representation ineffective." Terry v. State, 857 N.E.2d 396, 403 (Ind. Ct. App. 2006),

¹ Normally, a post-conviction hearing is the preferred forum to adjudicate a claim of ineffective assistance of counsel. McIntire v. State, 717 N.E.2d 96, 101 (Ind. 1999); Woods v. State, 701 N.E.2d 1208, 1219 (Ind. 1998). Presenting such a claim often requires the development of new facts not present in the trial record. McIntire, 717 N.E.2d at 101. While a defendant may choose to raise a claim of ineffectiveness of counsel on direct appeal, if he does so the issue will be foreclosed from collateral review. Id. at 102; Woods, 701 N.E.2d at 1220.

trans. denied. Second, the defendant must show that the deficient performance prejudiced his defense. Overstreet, 877 N.E.2d at 152. The defendant must show that the errors were so serious that the defendant was deprived of a fair trial. Id. “To establish prejudice, a defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Id. “Further, counsel’s performance is presumed effective, and a defendant must offer strong and convincing evidence to overcome this presumption.” Id.

A. Failure to Object to Testimony

Karr argues that trial counsel should have objected to testimony of State’s witnesses regarding conversations with M.J. Karr believes that the testimony was inadmissible hearsay. Karr cites to several colloquies as evidence that the witnesses were vouching for M.J.’s testimony or that they testified as to statement’s made by M.J. However, these statements were not offered to prove the matter asserted, i.e. that Karr molested M.J., they merely recount what M.J. said to each witness. Furthermore, M.J. testified as to these out-of-court statements. The testimony of the State’s witnesses is cumulative of M.J.’s testimony regarding the events surrounding her molestation by Karr. See Tobar v. State, 740 N.E.2d 106, 108 (holding that evidence that is merely cumulative need not be excluded and does not require reversal). Therefore, Karr cannot establish that he was prejudiced by trial counsel’s failure to object to the testimony of the State’s witnesses.

B. Failure to Object to Admission of Photograph

Karr argues that trial counsel should have objected to the admission of M.J.'s photograph when she was eleven years old because it was cumulative and immaterial. As noted by Karr, the photograph was cumulative since M.J. testified in person at trial. See Id. Therefore, Karr cannot establish that he was prejudiced by trial counsel's failure to object to the admission of the photograph.

C. Failure to Adequately Cross-Examine

Karr argues that trial counsel failed to adequately cross-examine the State's witnesses. The nature and extent of cross-examination is a matter of strategy left to the trial counsel. Waldon v. State, 684 N.E.2d 206, 208 (Ind. Ct. App. 1997), trans. denied. Ineffective assistance is not found even when a strategic or tactical determination by counsel turned out to be detrimental to the client's case. State v. Moore, 678 N.E.2d 1258, 1261 (Ind. 1997).

Counsel's performance is presumed effective and the defendant must offer strong and convincing evidence to overcome that presumption. Overstreet, 877 N.E.2d at 152. Karr has not provided any evidence that the cross-examination was ineffective. In fact, it appears from the testimony that trial counsel was seeking to establish that none of the witnesses actually saw any molestation and did not think enough of the allegations to report the molestation to the authorities. While Karr may have wished to pursue the cross-examination further, we will not second-guess trial counsel's tactics or strategy. As such we find that Karr failed to provide strong and convincing evidence that his trial counsel's cross examination constituted ineffective assistance of counsel.

II. Jury Question

Karr argues that a juror question revealed juror bias and prevented him from receiving an impartial jury and is fundamental error. The question was “[w]hat if anything did your uncle Bob say to you while the molestation was going on – did he make any threats or tell you not to tell?” Tr. p. 87. Karr did not object to the question at trial and therefore has waived the issue, however, we will address an issue waived at trial if we find fundamental error.² Perry v. State, 867 N.E.2d 638, 642 (Ind. Ct. App. 2007), trans. denied. The “fundamental error” rule applies when an error “constitutes a blatant violation of basic principles, the harm or potential for harm is substantial, and the resulting error denies the defendant fundamental due process.” Dickenson v. State, 835 N.E.2d 542, 548-49 (Ind. Ct. App. 2005), trans. denied. To succeed, Karr must prove that the error was so prejudicial as to make a fair trial impossible. Id. We look to the totality of the circumstances and determine whether the error had a substantial influence on the outcome. Caron v. State, 824 N.E.2d 745, 751 (Ind. Ct. App. 2005), trans. denied.

Karr has not shown that the supposed error in allowing the jury question was so prejudicial that he was denied a fair trial. Merely alleging that a question shows bias is insufficient to prove that juror bias existed. We conclude that the juror question did not constitute fundamental error.

III. Sufficiency of Evidence

Karr argues that the evidence presented at trial failed to prove that M.J. was molested during the specific time noted in the charging information. When we review a claim of sufficiency of the evidence, we do not reweigh the evidence or judge the

² Karr has failed to show that failure to object to the jury question was ineffective assistance of counsel.

credibility of witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

The statute Karr was charged under requires that the victim be less than the age of fourteen. See Ind. Code 35-42-4-3(a) (2004). M.J. was born on May 27, 1989. Tr. p. 103. The charging information alleged that the molestation occurred between March 25, 1999 and May 17, 2001. M.J. testified that she was “exactly” eleven when the molestation occurred. Tr. p. 61. This evidence is sufficient to support Karr’s conviction for child molestation.

Conclusion

Karr failed to show that his trial counsel provide ineffective assistance. Also, he has failed to prove that a jury question constituted a fundamental error. Additionally, the evidence was sufficient to support Karr’s conviction for Class A felony child molestation.

Affirmed.

MAY, J., and VAIDIK, J., concur.